IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 215 OF 2003

M/s. Seagull Threads (India) Ltd., a company incorporated under the provisions of the Companies Act 1956 and having its registered office at 31, Busa Udyog Bhawan, T-3 Road, Sewri, Mumbai - 400 015 and a factory at Seagull House, Plot nos.63 to 65 and 74, 75, Sancoale Industrial Area, Zuari Nagar, Goa, 403 726. ...Petitioners.

Versus

1. Union of India, (through its Joint Secretary, Ministry oif Law, Justice and Company Affairs, Aayakar Bhavan, M. K. Road, Churchgate, Bombay 400 020,

2. The Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai, having its office at PNB House, Sir P.M. Road, Mumbai 400 001, and

3. Commissioner of Customs & Central Excise, Customs House, Panaji, Goa. ...Respondents.

Shri Sudin Usgaokar, advocvate for the petitioners.

Shri N. K. Sawaikar, Addl. Central Govt. Standing Counsel for the respondents.

CORAM : F. I. REBELLO, J.

DATE : 3rd July, 2003.

ORAL JUDGMENT

Rule. Respondents waive service. Heard forthwith.

The challenge by the petitioners in this petition is to the Order dated 8th July, 2002, whereby the application

for restoration of the appeal on failure by the petitioners herein to comply with the order for deposit and the application for waiver of deposit were rejected. The record would show that the Show Cause Notice dated 4th February, 1997, was issued to the petitioners herein. A reply came to be filed by the petitioners herein. On 31st October, 1997, the Commissioner of Customs and Central Excise confirmed the demands and further imposed penalty of equivalent amount under Section 11AC of the Central Excise Act 1944 read with the Rules. The petitioners preferred an appeal to respondent No.2 alongwith an application for waiver of pre-deposit or duty demanded and penalty under Section 35F of the said Act. On 20th October, 1999, hearing took place before the Tribunal. The petitioners were represented by a Chartered Accountant. The Tribunal directed the Chartered Accountant to file two affidavits, one of the petitioners and the other of the Auditors, regarding the true position of the accounts. The matter was adjourned on 18th November, 1999. On 18th November, 1999, the Chartered Accountant dis-associated himself from the case by filing letter dated 16th November, 1999, with the Registrar of the Tribunal. An ex parte Order came to be passed on 29th December, 1999, whereby the petitioners were directed to deposit a sum of Rs.25,00,000/-. On 4th May, 2000, the petitioners made an application to the Assistant Registrar regarding non-receipt of the Order dated 29th December, 1999, and requested for certified copy of the same. In the meantime, on 12th April, 2000, as there was

non-compliance with the order of deposit, the Appeal itself was dismissed.

On 12th October, 2000, the petitioners filed an application for restoration. A letter was issued by the Superintendent of Customs on 24th November, 2000, directing the petitioners to deposit a sum of Rs.25,00,000/- as per the Order of the Tribunal. On 17th May, 2001, an application for restoration of appeal was heard by the Tribunal and the case was adjourned to 23rd July, 2001, to enable the petitioner to file affidavit regarding dates and events. On 20th July, 2001, the Tribunal dismissed the application for restoration filed by the petitioners. A fresh application was made on 12th October, 2001, for restoration. Several letters were issued by the Tribunal to the petitioners requesting the Tribunal for disposal of the matter at the earliest. On 8th July, 2002, application for restoration of the appeal was disposed of and, consequently, this Writ Petition was filed.

2. Broadly, the challenges by the petitioners are that when the application for deposit was made and also dismissal of the appeal, the petitioners were not represented. In these circumstances it is submitted, that would clearly amount to an infraction of the procedural requirement of giving notice to the petitioners before the application for stay and the Appeal were disposed of. Insofar as application for restoration is concerned, it is

pointed out that the petitioners had given their address at Mumbai. No notice was given on that address and, consequently also, application could not have been dismissed without proper notice to the petitioners herein. Learned counsel relies on the judgment in the case of **Mahindra & Mahindra Ltd. vs. Union of India, 1991 (51)ELT 219 (Bom.),** to point out that an order refusing to waive pre-deposit could not be passed without giving an opportunity to the petitioners herein and in those circumstances the Court directed the authorities there to dispose of the matter after complying with the provisions of natural justice and fair play.

On behalf of the respondents an affidavit has been filed by the Deputy Commissioner of Customs and Central Excise, Shri Pritidas Vishnu Prabhu Desai. It is pointed out therein that the petitioners have suppressed material facts. It is pointed out that the petitioners were represented by Shri R. D. Wagley, Chartered Accountant, on 20th October, 1999. The Order passed on 3rd November, 1999, was not complied with either by the petitioner or their Chartered Accountant. On the next date of hearing, neither the petitioners nor their Chartered Accountant were present and in these circumstances, the Order was passed. It is pointed out that every opportunity was given to the petitioners to comply with this Order and even to lead evidence. Hearing was given on 13th March, 2000. The petitioners however, did

not attend the hearing. The application basically deals with the contentions that the petitioners were given opportunity.

3. It is not necessary to go into the controversy, as in my opinion, the mere fact that the Chartered Accountant withdrew cannot be foisted on the respondents. It was the petitioners who had engaged the Chartered Accountant. It is impossible to believe that the Chartered Accountant would not have intimated to the petitioners the directions of the Tribunal calling upon the petitioner and their Auditor to file the affidavits explaining the entries in their balance sheets. To my mind, therefore, ordinarily the Order directing deposit and further Order directing dismissal of the appeal for failure to deposit, really could not have been faulted with.

4. In the application for restoration, however, the petitioners had given their address for the purpose of attending the hearings at Mumbai. The petitioners did not receive any communication at Mumbai, though it was clearly set out that further correspondence should be addressed in Mumbai. Application for restoration was dismissed without taking note of this fact that the petitioners had intimated to the respondents that further communication should be addressed to their address at Mumbai.

5. Taking an overall view of the matter, without

merely restoring the application and considering the totality of the circumstances, the ends of justice would be met if the petitioners are directed to deposit a sum of Rs.10,00,000/- (rupees ten lakhs only) as a condition precedent to the hearing of the appeal.

In the light of that the following Order:-

The impugned Orders dated 8th July, 2002 and 12th April, 2000, are set aside, on terms and conditions as set out hereinunder. The Order dated 29th December, 1999, is modified to the extent that instead of the deposit of Rs.25,00,000/- the petitioners will deposit the sum of Rs.10,00,000/- (rupees ten lakhs only), within eight weeks from today. On failure to deposit the said amount within eight weeks from today, the Appeal alongwith the application for stay and waiver shall stand dismissed. If the amount is deposited, the respondents to hear the appeal and dispose of the same on merits.

Rule made partly absolute accordingly. There shall be no order as to costs.

F. I. REBELLO, J.

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